Basil bin Omar v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO S-05-27 OF 1994
ABDUL HAMID MOHAMAD, MOHD SAARI, KC VOHRAH JJCA
8 OCTOBER 2002

Criminal Law *— Dangerous Drugs Act (Malaysia) — s 39B(1)(a) — Whether accused had actual possession of the impugned drugs — Whether the impugned drugs were adequately examined*

Criminal Procedure *— Appeal — Evidence — Trial judge did not make affirmative finding that the accused had actual possession of the impugned drugs — Whether sufficient evidence to support finding of actual possession*

This was an appeal against the decision of the High Court of Sandakan in which the appellant ('the accused') was convicted on a charge of trafficking 1,241g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and was sentenced to death under s 39B(2) thereof. On 31 January 1990, the accused boarded a taxi in front of Sandakan market to get to Jaya Chip. The accused sat in the front passenger seat next to the taxi driver ('PW4'). At the time of boarding the taxi, the accused had a striped bag (P7) and a blue jacket (P8) with him. On the way there, the taxi was stopped at a roadblock set up by the police. At the roadblock, the accused was requested to come out of the taxi by PC Aziz ('PW3'). Upon alighting from the taxi, the accused attempted to run away but was caught after putting up a struggle. On checking the front passenger seat, PW3 found a jacket on top of the striped bag. Upon examining the bag, PW3 found two packages containing dried leaves. The dried leaves were sent to the chemist for analysis and the result found that the dried leaves were cannabis. The issues for determination were whether the accused had actual possession of the impugned drugs and whether the impugned drugs were adequately examined and analyzed by the chemist ('PW1')

Held, dismissing the appeal:

(1) From the facts and circumstances of the case, the accused had physical control of the impugned drugs. On the conduct of the accused, the evidence established that: (i) on sighting the roadblock, the accused told PW4 to turn the taxi back to town; (ii) the accused covered the bag with his jacket; and (iii) the accused tried to run away and on being stopped, the accused put up a struggle. From the conduct and surrounding circumstances of the case, the irresistible inference was that the accused must have had knowledge of the impugned drugs inside the bag (see p 197C–F); *Chan Pean Leong v Public Prosecutor* [1956] MLJ 237 followed.

(2) The court distinguished *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11 in that the facts of that case showed that out of the cannabis weighing 793.85g, the chemist merely took a representative sample from 79.30g for analysis, leaving the balance of the cannabis not analyzed. In the instant appeal, the court observed that PW1 took representative samples weighing 120g from different parts of the impugned drugs in package exh '1' for analysis and representative samples weighing 6g from different parts at random from the impugned drugs in package exh '2'. In the premise, the court held that the appeal on this issue was without merit (see pp 197H–198A); *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11 distinguished.

(3) Reverting to the first issue, the court was conscious of the fact that the learned trial judge did not make an affirmative finding that the accused was in actual possession of the impugned drugs. However, following *Tunde Apatira & Ors v Public Prosecutor* [2001] 2 MLJ 259 and the evidence against the accused, the court was of the view that it was appropriate to apply the proviso of s 60(1) of the Courts of Judicature Act 1964 ('the CJA') to this case (see p 198A, C–D); *Tunde Apatira & Ors v Public Prosecutor* [2001] 2 MLJ 259 followed.

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap keputusan Mahkamah Tinggi Sandakan di mana perayu ('tertuduh') telah disabitkan di atas pertuduhan mengedar 1,241g kanabis di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan telah dijatuhkan hukuman mati di bawah s 39B(2). Pada 31 Januari 1990, tertuduh telah menaiki sebuah teksi di hadapan pasar Sandakan untuk pergi ke Jaya Chip. Tertuduh telah duduk di bahagian hadapan penumpang sebelah pemandu teksi tersebut ('PW4'). Pada masa menaiki teksi tersebut, tertuduh mempunyai sebuah beg bercorak belang-belang (P7) dan jaket biru (P8) bersama beliau. Semasa ke sana, teksi tersebut telah berhenti di satu sekatan jalan yang diadakan oleh pihak polis. Di sekatan jalan tersebut, tertuduh telah diminta keluar daripada teksi tersebut oleh PC Aziz ('PW3'). Sebaik sahaja turun daripada teksi tersebut, tertuduh cuba melarikan diri tetapi telah ditangkap selepas berlaku satu pergelutan. Semasa memeriksa tempat duduk penumpang di bahagian depan, PW3 menjumpai jaket di atas beg bercorak belang-belang tersebut. Semasa memeriksa beg tersebut, PW3 menjumpai dua bungkusan yang mengandungi daun-daun kering. Daun-daun kering tersebut telah dihantar kepada ahli kimia untuk dianalisa dan hasilnya menunjukkan bahawa daun-daun kering tersebut adalah kanabis. Persoalan-persoalan untuk ditentukan adalah sama ada tertuduh mempunyai milikan sebenar dadah yang dipersoalkan dan sama ada dadah yang dipersoalkan telah diperiksa dan dianalisa secukupnya oleh ahli kimia tersebut ('PW1').

Diputuskan, menolak rayuan tersebut: A

(1) Daripada fakta-fakta dan keadaan-keadaan kes tersebut, tertuduh mempunyai kawalan fizikal ke atas dadah yang dipersoalkan. Berhubung perbuatan tertuduh, keterangan menunjukkan bahawa: (i) melihat sekatan jalan, tertuduh telah memberitahu PW4 untuk pusing balik ke pekan; (ii) tertuduh menutup beg B tersebut dengan jaket beliau; dan (iii) tertuduh telah cuba melarikan diri dan apabila disuruh berhenti, tertuduh telah melawan. Daripada perbuatan dan keadaan sekeliling kes, inferens yang tidak dapat dibendung adalah bahawa tertuduh mestilah mempunyai pengetahuan tentang dadah yang C dipersoalkan dalam beg tersebut (lihat ms 197C–F); *Chan Pean Leong v Public Prosecutor* [1956] MLJ 237 diikut.

(2) Mahkamah telah membezakan *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11 di mana fakta-fakta dalam kes tersebut telah menunjukkan bahawa daripada sejumlah kanabis yang beratnya D 793.85g, ahli kimia tersebut hanya mengambil satu contoh representatif daripada 79.30g untuk analisis, meninggalkan baki kanabis tersebut tidak dianalisa. Dalam rayuan semasa, mahkamah memperhatikan bahawa PW1 telah mengambil contoh representatif yang beratnya 120g daripada bahagian-bahagian yang berbeza dadah yang dipersoalkan dalam E bungkusan eksh '1' untuk analisis dan contoh-contoh representatif yang beratnya 6g daripada bahagian-bahagian yang berbeza dadah yang dipersoalkan dalam bungkusan eksh '2'. Dalam premis tersebut, mahkamah telah memutuskan bahawa rayuan berhubung persoalan ini adalah tanpa merit (lihat ms 197H–198A); *Leong Bon Huat v Public Prosecutor* [1993] 3 F MLJ 11 dibeza.

(3) Berbalik kepada persoalan pertama, mahkamah peka tentang hakikat bahawa hakim perbicaraan yang arif tidak membuat satu penemuan yang kukuh bahawa tertuduh mempunyai milikan sebenar dadah yang dipersoalkan. Namun begitu, mengikut G *Tunde Apatira & Ors v Public Prosecutor* [2001] 2 MLJ 259 dan keterangan terhadap tertuduh, mahkamah berpendapat bahawa adalah sesuai untuk memakai proviso s 60(1) Akta Mahkamah Kehakiman 1964 ('AMK') kepada kes ini (lihat ms 198A, C–D); *Tunde Apatira & Ors v Public Prosecutor* [2001] 2 MLJ 259 diikut. H

Notes

For cases on Dangerous Drugs Act 1952 s 39B(1)(a), see 4 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 143–203. I

For cases on evidence, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 255–294.

Cases referred to

Chan Pean Leon v PP [1956] MLJ 237 (folld)
Leong Bon Huat v PP [1993] 3 MLJ 11 (distd)
Muhammed Hassan v PP [1998] 2 CLJ 170 (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 60(1)
Dangerous Drugs Act 1952 ss 2, 39B, (1)(a), (2)

VK Liew (*VK Liew & Co*) for the appellant.
Nurulhuda bte Mohd Nor (Attorney-General's Chambers) for the respondent.

Mohd Saari JCA (delivering judgment of the court): This appeal was against the decision of the High Court of Sandakan in which the appellant ('the accused') was convicted on a charge of trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and was sentenced to death under s 39B(2) thereof. At the conclusion of the hearing, we unanimously dismissed the appeal.

The charge against the accused reads:

> That you, on the 1st day of February 1990 at about 12.35 am, Jalan Batu Sapi, Pasir Putih, the District of Sandakan, in the State of Sabah, on your own behalf did traffic in a dangerous drug, to wit 1,241 grammes of cannabis and that you have thereby committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) and punishable under s 39B(2) of the same Act.

The prosecution's case

Briefly, the facts are as follows. On 31 January 1990, at about midnight, PW4 was in his taxi, No SS 7011, in front of Sandakan market when PW4 was approached by the accused. They struck a bargain whereby PW4 agreed to take the accused to Jaya Chip which was at the end of Jalan Batu Sapi for a fare of RM10. The accused boarded the taxi and sat in the front passenger seat next to PW4. There was no other person in the taxi.

At the time of boarding the taxi, the accused had a striped bag (P7) and a blue jacket (P8) with him. The taxi proceeded to Jaya Chip via Pasir Putih. On reaching Pasir Putih, the taxi stopped at a road-block which was set up by the police. At the roadblock, the accused came out of the taxi at the request of PC Aziz ('PW3'). After having alighted from the taxi, the accused attempted to run away but PW3 caught him by the collar of his shirt. The accused put up a struggle before being handcuffed. On checking the front passenger seat, PW3 found a jacket on top of the striped bag (P7). PW3 took the bag to the bus stop near the roadblock. In examining the bag, PW3 found a plastic bag therein with the word 'Ajinomoto' written on it. In the plastic bag there were two packages stuffed with dried leaves. The police

sent the dried leaves to the chemist for analysis. The result of the analysis was that the dried leaves in the two packages were cannabis within the meaning of s 2 of the DDA and weighed 1,241g. A

The case for the defence

The case for the defence was that on the night in question, the accused had gone to a fish market at Sandakan with two others. From the fish market, the accused took a taxi to go to Kg Bahagia. While en route to Kg Bahagia, the taxi stopped at a roadblock at Pasir Putih. At the roadblock, on the instruction of the police, he alighted from the taxi and went to a bus stop nearby. While at the bus stop, the police handcuffed him. The accused denied carrying anything when he boarded the taxi. He also denied that PW4 was the driver of the taxi. In short, the defence was one of frame-up. B C

The issues

At the hearing of this appeal, the issues which emerged were as follows: D

(i) whether the accused had actual possession of the impugned drugs;

(ii) whether the impugned drugs were adequately examined and analyzed by the chemist (PW1).

On the first issue E

The learned deputy public prosecutor ('DDP') submitted that though there was no affirmative finding by the learned trial judge that the accused was in actual possession of the impugned drugs on the principle as enunciated in *Muhammed Hassan v Public Prosecutor* [1998] 2 CLJ 170, there was sufficient evidence to support a finding that the accused was in actual possession of the impugned drugs. Evidence was led by prosecution and was accepted by the trial judge may be enumerated as follows: F

(1) at all material times, PW4 was the driver of the taxi with the accused sitting next to the former. Such finding was supported by the evidence of police personnel;

(2) at the time of boarding the taxi, the accused was carrying a striped bag (exh P7); G

(3) while in the taxi, the accused placed the bag and the jacket on his lap;

(4) on sighting the roadblock, the accused requested PW4 to turn back to town;

(5) on nearing the roadblock, the accused placed the bag on the floor board in front of him and covered it with the jacket; H

(6) while at the roadblock, the accused tried to run away but was stopped by PW3. Before the accused was being handcuffed, the accused put up a struggle.

In *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 at p 239, Thomson J (as he then was) said: I

A 'Possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed, p 304):

> 'A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.'

B To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some C *animus possidendi*. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.

On the facts and circumstances of this case as stated above, we agree D with the learned DPP that the accused had physical control of the impugned drugs. On conduct of the accused, the evidence established the following:

(i) on sighting the roadblock, the accused told the taxi driver (PW4) to turn the taxi back to town;

E (ii) the accused covered the bag with his jacket;

(iii) the accused tried to run away and on being stopped, the accused put up a struggle.

From the conduct and surrounding circumstances of the case, the irresistible inference is that the accused must have had knowledge of the F impugned drugs inside the bag. On this issue, our finding is in the affirmative.

On the second issue

Mr Liew, the learned counsel for the accused, told the court that this issue G was his strongest point. Our attention was drawn to the impugned drugs in package exh '1' and in package exh '2'. He submitted that the impugned drugs were not adequately analyzed on the ground that only 120g (a little bit more than 10%) was taken for analysis from package exh '1' and only 6g was taken from the package exh '2'. The Supreme Court case of *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11 was cited in support of the H defence's case.

Adverting to the evidence of PW1 (chemist), we observe that PW1 took representative samples weighing 120g from different parts of the impugned drugs in package exh '1' for analysis and representative samples weighing 6g from different parts at random from the impugned drugs in package exh '2'. I With greatest respect, we are of the view that the facts in *Leong Bon Huat* are distinguishable. In that case, according to the chemist's testimony, out of the cannabis weighing 793.85g, he merely took a representative sample

from 79.30g for analysis, leaving the balance of the cannabis not analyzed. In the premise, we hold that the appeal on this issue is without merit. A

Reverting to the first issue, we are conscious of the fact that nowhere in his judgment did the learned trial judge make an affirmative finding that the accused was in actual possession of the impugned drugs. However, we are reminded of the Federal Court case of *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259. In that case, his lordship Gopal Sri Ram JCA said at p 266: B

> As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied, that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. The decision of this court in *Alcontara all Ambross Anthony v PP* [1996] 1 MLJ 209 exemplifies the general rule, while that in *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 illustrates the exception. C

As for the instant case, the evidence, both direct and circumstantial, against the accused is, in our view, overwhelming, hence this is an appropriate case for the proviso of s 60(1) of the Courts of Judicature Act 1964 to apply. D

In the premise and for reasons abovestated, we dismissed the appeal. The conviction and sentence imposed by the court below is hereby affirmed.

Appeal dismissed. E

Reported by Zahid Taib

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